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U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Lifelines Technology, Inc.

Serial No. 75/064,093

Arthur P. Plantamura, Esq. for applicant.

Glenn G. Clark, Trademark Examining Attorney, Law Office 102 (Thomas V. Shaw, Managing Attorney).

Before Simms, Walters and Chapman, Administrative Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Lifelines Technology, Inc. has filed a trademark application to register the mark shown below for "time-temperature sensitive labels that monitor the condition of thermally sensitive products."[1]

[1] Serial No. 75/064,093, in International Class 9, filed February 12, 1996, based on an allegation of use of the mark in commerce, alleging first use as of August 1, 1988, and first use in commerce as of November 21, 1988.

The Trademark Examining Attorney has finally refused registration under Sections 1, 2 and 45 of the Trademark Act, 15 U.S.C. 1051, 1052 and 1127, on the ground that the applied-for mark does not identify and distinguish the goods of applicant from those of others and does not indicate the source of such goods.

Applicant has appealed. Both applicant and the Examining Attorney have filed briefs, but an oral hearing was not requested. We affirm the refusal to register.

We note, preliminarily, that applicant, in its brief, mischaracterizes the issue before us as "whether appellant's mark is *capable* of identifying appellant's brand of time-temperature indicators and distinguishing them from the time-temperature products of others *(emphasis added)*." Not only is this not an application on the Supplemental Register where capability would be the issue, but the Examining Attorney has not, at any point during the prosecution of this application, indicated that the applied-for mark is *incapable* of functioning as a mark.[2]

[2] Likewise, as applicant has not submitted a claim under Section 2(f) of the Trademark Act, the issue of acquired distinctiveness is not before us.

The specimen of record is a strip upon which are several of applicant's identical labels. The labels have a backing that permits them to be peeled off the strip and, presumably, attached to the time/temperature-sensitive product being monitored or to the packaging therefor. The labels are rectangular, measuring approximately one inch by seven-eighths of an inch, and red with black lettering and design. The applied-for mark appears in the center of the label and has an outer diameter of approximately five-sixteenths of an inch. Immediately above the applied-for mark is the wording "Fresh Check® Indicator"; and immediately below the applied-for mark is the statement "Do not use if center is darker than ring."

The Examining Attorney submitted several excerpts of articles from the LEXIS/NEXIS database which refer specifically to applicant and indicate, consistent with the identification of goods and applicant's contentions, that applicant produces an easily readable indicator device to monitor the time-temperature conditions to which perishable products, in particular, perishable food and medical products, have been exposed.[3] Referring to the statement on the specimens of record, the Examining Attorney contends

[3] We agree with applicant that the LEXIS/NEXIS submissions do not support the Examining Attorney's refusal; rather, the excerpts merely

that applicant's applied-for mark functions as applicant's "readable indicator" and concludes that, as such, the applied-for mark "merely serves an informational function because it provides the label-user with a contrasting reference color … so the user may determine whether the goods have been exposed to unacceptably high temperatures or long periods of time since manufacture."

Applicant contends, on the other hand, that its design is used "as a brand name in the marketing of indicators that are used to monitor the environmental time-temperature conditions to which a product that carries applicant's brand of indicator has been exposed." Applicant contends that the design comprising the applied-for mark is not, in fact, a time-temperature indicator; that the mark is "separate from the indicator composition which is [applicant's] product"; that the material in the center of the design is the time-temperature indicator, *i.e.*, in the hole of the donut design which comprises the mark; and that the time-temperature indicator material could be in any shape and could be positioned in different places on the label, for example, contiguous to the donut design.

While it may be true that, as applicant contends, its freshness indicator could be any of an infinite variety of

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confirm and describe the nature of the goods identified in the

shapes, such a fact does not affect our determination of the issue before us. As the Examining Attorney notes in his brief, "the shape or design of the applicant's proposed mark is not the issue in the present case … if the proposed mark consisted of a stylized square or triangle, the same refusal would have been proper … the proposed mark merely conveys information as to the perishable product's freshness."

The term "trademark," as defined in the relevant part of Section 45 of the Trademark Act, means "any word, name, symbol, or device, or any combination thereof used by a person to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown."

The court, in *In re Bose Corp.*, 546 F.2d 893, 192 USPQ 213, 215 (CCPA 1976), stated that "[b]efore there can be registration, there must be a trademark, and unless words have been so used they cannot qualify." (*citation omitted.*) Noting that "the classic function of a trademark is to point out distinctively the origin of the goods to which it is attached," the court stated further (*citations and footnote omitted*):

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application.

> An important function of specimens in a trademark application is, manifestly, to enable the PTO to verify the statements made in the application regarding trademark use. In this regard, the manner in which an applicant has employed the asserted mark, as evidenced by the specimens of record, must be carefully considered in determining whether the asserted mark has been used *as a trademark* with respect to the goods named in the application.

Id. at 215-216.

Clearly, not every word, combination of words, or design which appears on an entity's goods functions as a trademark. *In re Remington Products Inc*., 3 USPQ2d 1714 (TTAB 1987). To be a mark, the designation must be used in a manner calculated to project to purchasers or potential purchasers a single source or origin for the goods. Mere intent that a designation function as a trademark is not enough in and of itself to make that designation a trademark. *Id.*

A critical element in determining whether a term is a trademark is the impression the term makes on the relevant public. *In re Volvo Cars of North America, Inc*., 46 USPQ2d 1455, 1459 (TTAB 1998). In the case before us, the inquiry is whether the design sought to be registered would be perceived as a source indicator or, rather, as merely an informational device in connection with the identified goods. We find nothing in the record to indicate that

applicant has used or promoted the applied-for mark as a trademark. *See, In re Manco Inc.*, 24 USPQ2d 1938 (TTAB 1992) [THINK GREEN merely informational slogan devoid of trademark significance], and cases cited therein.

In the case before us, the only evidence of record regarding the purchasing public's possible perception of the applied-for mark is the specimen of record. As described herein, we have a small label in the center of which appears a common and simple design of a donut-like circle with a hollow center. Applicant acknowledges that the time-temperature sensitive material that comprises the single functional aspect of its goods is in the center hole of the donut. The two written phrases on the label identify the label as the "Fresh-Check Indicator" and instruct the reader "Do not use if center is darker than ring," referring to the applied-for mark. Clearly, the only reasonable conclusion to draw from this specimen is that the applied-for mark, *i.e.*, the donut-like circle design, functions to impart the information that is the essence of the identified goods. There is no evidence to support the conclusion that the purchasing public would perceive this design to be a trademark.[4] We conclude that

[4] The applicant's argument that the center of the "donut" is not part of the mark is an unreasonable dissection of the applied-for mark. Regardless of whether the indicator material could be placed elsewhere

the Examining Attorney properly refused registration on the ground that the applied-for mark does not function as a trademark to identify and distinguish the recited goods.

Decision: The refusal under Sections 1, 2 and 45 of the Act is affirmed.

R. L. Simms

C. E. Walters

B. A. Chapman
Administrative Trademark Judges,
Trademark Trial and Appeal Board

on the label, it is placed in the very center of the applied-for mark. The applied-for mark, in fact, functions as a "bull's-eye," to use applicant's own description, to focus the user's attention on the center of the circle where the time-temperature sensitive material is located.